DIVISION XI
SPECIAL EDUCATION APPEALS

281—41.112(17A,256B,290) Definitions. As used in this division:

"*Administrative law judge*" means an administrative law judge designated by the director of education from the list of approved administrative law judges to hear the presentation of evidence and, if appropriate, oral arguments in the hearing. The administrative law judges are selected under authority granted by the board. Such authority provides for the contracting with qualified personnel to serve as administrative law judges who are not personally or professionally involved so as to conflict with objectivity and are not employees or board members of either state, intermediate or local education agencies involved in the education or care of the individual. The department shall keep a list of the persons who serve as administrative law judges. The list shall include a statement of the qualifications of each of those persons.

"*Appellant*" means the party bringing a special education appeal to the department.

"*Appellee*" means the party in a matter against whom an appeal is taken.

"*Parties*" means the appellant, appellee and third parties named or admitted as a party.

281—41.113(17A,256B) Manner of appeal.

41.113(1) *Initiating a hearing.*

a. A parent may initiate a preappeal conference or hearing when an educational public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the individual or the provision of FAPE to the individual. If a hearing is initiated, the department shall inform the parents of the availability of the mediation conference as described in subrule 41.113(10).

b. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the eligible individual, and the question of financial responsibility, are subject to the due process procedures of 34 CFR §§300.500-300.515.

c. A public agency may use the preappeal or hearing procedures to determine if the individual may be evaluated or initially provided special education and related services without parental consent. If a public agency requests a hearing and the administrative law judge upholds the agency, the agency may evaluate or initially provide special education and related services to the individual without the parent's consent.

d. The appropriate AEA serving the individual shall be deemed to be a party with the LEA whether or not specifically named by the parent or agency filing the appeal. In instances where the individual is served through a contract with another agency, the school district of residence of the individual shall be deemed a party.

e. Under certain circumstances, an expedited hearing is provided under subrule 41.73(4).

41.113(2) *Conducting a hearing.* The hearing shall be conducted by the department.

41.113(3) *Parent notice to the department.* The parent of an individual with a disability or the attorney representing the individual shall provide notice (which shall remain confidential) to the department in a request for a hearing.

41.113(4) *Content of parent notice.* The notice required in subrule 41.113(3) must include the name of the individual; the address of the residence of the individual; the name of the school the individual is attending; a description of the nature of the problem of the individual relating to the proposed or refused initiation or change, including facts relating to the problem and a proposed resolution of the problem to the extent known and available to the parents at the time.

41.113(5) *Model form to assist parents.* The department's model form shall be made available to assist parents in filing a request for due process that includes the information required in subrules 41.113(3) and 41.113(4).

41.113(6) *Right to due process hearing.* A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in subrules 41.113(3) and 41.113(4).

41.113(7) *Notice.* The director of education or designee shall, within five business days after the receipt of the appeal, notify the proper school officials in writing of the appeal and the officials shall, within ten business days after receipt of the notice, file with the department all records relevant to the decision appealed.

41.113(8) *Free or low-cost legal services.* The department shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or the parent or the agency initiates a hearing.

41.113(9) *Written notice.* The director of education or designee shall provide notice in writing delivered by fax, personal service as in civil actions, or by certified mail, return receipt requested, to all parties at least ten calendar days prior to the hearing unless the ten-day period is waived by both parties. Such notice shall include the time and the place where the matter of appeal shall be heard. A copy of the appeal hearing rules shall be included with the notice.

41.113(10) *Mediation conference.* Parties shall be contacted by department personnel to ascertain whether they wish to participate in a mediation conference. Mediation is a voluntary process in which an impartial third party, a mediator, facilitates the resolution of disagreements by promoting dialogue among the parties to clarify the issues and assist them in making their own mutually acceptable decisions and agreements. The involved parties shall be notified that mediation is voluntary and that participation in mediation in no way shall deny or delay a party's right to a due process hearing or to any other rights afforded under these rules. Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute. Discussions that occur during the mediation process must be confidential, except as may be provided in Iowa Code chapter 679C, and may not be used as evidence in any subsequent due process hearings or civil proceedings; however, the parties may stipulate to agreements reached in mediation. Prior to the start of the mediation, the parties to the mediation conference and the mediator will be required to sign an Agreement to Mediate form which contains this confidentiality provision. Agreements reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

a. The mediation process is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

b. The mediator shall not be an employee of an LEA, AEA or state agency, or another state education agency that is providing direct services to an individual who is the subject of the mediation process and must not have a personal or professional conflict of interest.

c. The state shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

d. An AEA may establish procedures to assist parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party, who is under contract with a parent training and information center or community parent resource center, or an appropriate alternative dispute resolution entity and who would explain the benefits of the mediation process, and encourage the parents to use the process.

41.113(11) *Continuance.* A request for continuance may be made by any party to the designated administrative law judge. The administrative law judge may grant specific extensions of time beyond 45 calendar days after the receipt of a request for a hearing. If a continuance is requested it shall be heard and determined according to the provisions of this subrule.

41.113(12) *Dismissal.* A request for dismissal may be made to the administrative law judge at any time by the party initiating the appeal. A request or motion for dismissal made by the appellee shall be granted upon a determination by the administrative law judge that any of the following circumstances apply:

a. The appeal relates to an issue that does not reasonably fall under any of the appealable issues of identification, evaluation, placement, or the provision of a free appropriate public education.

b. The issue(s) raised is moot.

c. The individual is no longer a resident of the LEA or AEA against whom the appeal was filed.

d. The relief sought by the appellant is beyond the scope and authority of the administrative law judge to provide.

e. Circumstances are such that no case or controversy exists between the parties.

An appeal may be dismissed administratively when an appeal has been in continued status for more than one school year. Prior to an administrative dismissal, the administrative law judge shall notify the appellant at the last known address and give the appellant an opportunity to give good cause as to why an extended continuance shall be granted. An administrative dismissal issued by the administrative law judge shall be without prejudice to the appellant.

41.113(13) *Time and place of hearing.* The hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and individual involved.

281—41.114(17A,256B) Participants in the hearing.

41.114(1) *Conducting hearing.* The hearing shall be conducted by the administrative law judge.

a. Any person serving or designated to serve as an administrative law judge is subject to disqualification for bias, prejudice, interest, or any other cause for which a judge is or may be disqualified.

b. Any party may timely request the disqualification of an administrative law judge after receipt of notice indicating that the person will preside or upon discovering facts establishing grounds for disqualification whichever is later.

c. A person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination.

d. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by the

director of education from the list of other qualified administrative law judges.

41.114(2) *Counsel.* Any party to a hearing has a right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of individuals with disabilities.

41.114(3) *Opportunity to be heard—appellant.* The appellant or representative shall have the opportunity to be heard.

41.114(4) *Opportunity to be heard—appellee.* The appellee or representative shall have the opportunity to be heard.

41.114(5) *Opportunity to be heard—director.* The director or designee shall have the opportunity to be heard.

41.114(6) *Opportunity to be heard—third party.* A person or representative who was neither the appellant nor appellee, but was a party in the original proceeding, may be heard at the discretion of the administrative law judge.

41.114(7) *Presence of individual.* Parents involved in hearings must be given the right to have the individual who is the subject of the hearing present.

281—41.115(17A,256B) Convening the hearing.

41.115(1) *Announcements and inquiries by administrative law judge.* At the established time, the name and nature of the case are to be announced by the administrative law judge. Inquiries shall be made as to whether the respective parties or their representatives are present.

41.115(2) *Proceeding with the hearing.* When it is determined that parties or their representatives are present, or that absent parties have been properly notified, the appeal hearing may proceed. When any absent party has been properly notified, it shall be entered into the record. When notice to an absent party has been sent by certified mail, return receipt requested, the return receipt shall be placed in the record. If the notice was in another manner, sufficient details of the time and manner of notice shall be entered into the record. If it is not determined whether absent parties have been properly notified, the proceedings may be recessed at the discretion of the administrative law judge.

41.115(3) *Types of hearing.* The administrative law judge shall establish with the parties that the hearing shall be conducted as one of three types:

a. A hearing based on the stipulated record.

b. An evidentiary hearing.

c. A mixed evidentiary and stipulated record hearing.

41.115(4) *Evidentiary hearing scheduled.* An evidentiary hearing shall be held unless both parties agree to a hearing based upon the stipulated record or a mixed evidentiary and stipulated record hearing.

41.115(5) *Educational record part of hearing.* The educational record submitted to the department by the educational agency shall, subject to timely objection by the parties, become part of the record of the hearing.

281—41.116(17A,256B) Stipulated record hearing.

41.116(1) *Record hearing is nonevidentiary.* A hearing based on stipulated record is nonevidentiary in nature. No witnesses shall be heard nor evidence received. The controversy shall be decided on the basis of the record certified by the proper official and the arguments presented on behalf of the respective parties. The parties shall be so reminded by the administrative law judge at the outset of the proceeding.

41.116(2) *Materials to illustrate an argument.* Materials such as charts and maps may be used to illustrate an argument, but may not be used as new evidence to prove a point in controversy.

41.116(3) *One spokesperson per party.* Unless the administrative law judge determines otherwise, each party shall have one spokesperson.

41.116(4) *Arguments and rebuttal.* The appellant shall present first argument. The appellee then presents second argument and rebuttal of the appellant's argument. A third party, at the discretion of the administrative law judge, may be allowed to make remarks. The appellant may then rebut the preceding arguments but may not introduce new arguments.

41.116(5) *Time to present argument.* Appellant and appellee shall have equal time to present their arguments and appellant's total time shall not be increased by the right of rebuttal. The time limit of argument shall be established by the administrative law judge.

41.116(6) *Written briefs.* Any party may submit written briefs. Written briefs by a person who is not a party may be accepted at the discretion of the administrative law judge. A brief shall provide legal authority for an argument, but shall not be considered as evidence. Copies of written briefs shall be delivered to all parties and, if desired, each party may submit reply briefs at the conclusion of the hearing or at a mutually agreeable time. A final decision shall be reached and a copy of the decision shall be mailed to the parties not later than 45 calendar days after the receipt of the request for the hearing unless the administrative law judge granted an extension of time beyond the 45 calendar days. The time for filing briefs may extend the time for final decision.

281—41.117(17A,256B) Evidentiary hearing.

41.117(1) *Testimony and other evidence.* An evidentiary hearing provides for the testimony of witnesses, introduction of records, documents, exhibits or objects.

41.117(2) *Appellant statement.* The appellant may begin by giving a short opening statement of a general nature which may include the basis for the appeal, the type and nature of the evidence to be introduced and the conclusions which the appellant believes the evidence shall substantiate.

41.117(3) *Appellee statement.* The appellee may present an opening statement of a general nature and may discuss the type and nature of evidence to be introduced and the conclusion which the appellee believes the evidence shall substantiate.

41.117(4) *Third-party statement.* With the permission of the administrative law judge, a third party may make an opening statement of a general nature.

41.117(5) *Witness testimony and other evidence.* The appellant may then call witnesses and present other evidence.

41.117(6) *Witness under oath.* Each witness shall be administered an oath by the administrative law judge. The oath may be in the following form: "I do solemnly swear or affirm that the testimony or evidence which I am about to give in the proceeding now in hearing shall be the truth, the whole truth and nothing but the truth."

41.117(7) *Cross-examination by appellee.* The appellee may cross-examine all witnesses and may examine and question all other evidence.

41.117(8) *Witness testimony and other evidence.* Upon conclusion of the presentation of evidence by the appellant, the appellee may call witnesses and present other evidence. The appellant may cross-examine all witnesses and may examine and question all other evidence.

41.117(9) *Questions and other requests by administrative law judge.* The administrative law judge may address questions to each witness at the conclusion of questioning by the appellant and the appellee. The administrative law judge may request to hear other witnesses and receive other evidence not otherwise presented by the parties.

41.117(10) *Rebuttal witnesses and additional evidence.* At the conclusion of the initial presentation of evidence and at the discretion of the administrative law judge, either party may be permitted to present rebuttal witnesses and additional evidence of matters previously placed in evidence. No new matters of evidence may be raised during this period of rebuttal.

41.117(11) *Appellant final argument.* The appellant may make a final argument, not to exceed a length of time established by the administrative law judge, in which the evidence presented may be reviewed, the conclusions outlined which the appellant believes most logically follow from the evidence and a recommendation of action to the administrative law judge.

41.117(12) *Appellee final argument.* The appellee may make a final argument for a period of time not to exceed that granted to the appellant in which the evidence presented may be reviewed, the conclusions outlined which the appellee believes most logically follow from the evidence and a recommendation of action to the administrative law judge.

41.117(13) *Third-party final argument.* At the discretion of the administrative law judge, a third party directly involved in the original proceeding may make a final argument.

41.117(14) *Rebuttal of final argument.* At the discretion of the administrative law judge, either side may be given an opportunity to rebut the other's final argument. No new arguments may be raised during rebuttal.

41.117(15) *Written briefs.* Any party may submit written briefs. Written briefs by a person who is not a party may be accepted at the discretion of the administrative law judge. A brief shall provide legal authority for an argument, but shall not be considered as evidence. Copies of written briefs shall be delivered to all parties and, if desired, each party may submit reply briefs at the conclusion of the hearing or at a mutually agreeable time. A final decision shall be reached and a copy of the decision shall be mailed to the parties not later than 45 calendar days after the receipt of the request for the hearing unless the administrative law judge granted an extension of time beyond the 45 calendar days. The time for filing briefs may extend the time for final decision.

281—41.118(17A,256B) Mixed evidentiary and stipulated record hearing.

41.118(1) *Written evidence of portions of record may be used.* A written presentation of the facts or portions of the certified record which are not contested by the parties may be placed into the hearing record by any party, unless there is timely objection by the other party. Such evidence cannot later be contested by the parties and no introduction of evidence contrary to that which has been stipulated may be allowed.

41.118(2) *Conducted as evidentiary hearing.* All oral arguments, testimony by witnesses and written briefs may refer to evidence contained in the material as any other evidentiary material entered at the hearing. The hearing is conducted as an evidentiary hearing.

281—41.119(17A,256B) Witnesses.

41.119(1) *Subpoenas.* The director of education shall have the power to issue (but not serve) subpoenas for witnesses, to compel the attendance of those thus served and the giving of evidence by them. The subpoenas shall be given to the requesting parties whose responsibility it is to serve to the designated witnesses. Requests for subpoenas may be denied or delayed if not submitted to the department at least five business days prior to the hearing date.

41.119(2) *Attendance of witness compelled.* Any party may compel by subpoena the attendance of witnesses, subject to limitations imposed by state law.

41.119(3) *Cross-examination.* Witnesses at the hearing or a person whose testimony has been submitted in written form, if available, shall be subject to cross-examination by any party necessary for a full and true disclosure of the facts.

281—41.120(17A,256B) Rules of evidence.

41.120(1) *Receiving relevant evidence.* Because the administrative law judge must decide each case fairly, based on the information presented, it is necessary to allow for the reception of all relevant evidence which shall contribute to an informed result. The ultimate test of admissibility is whether the offered evidence is reliable, probative and relevant.

41.120(2) *Acceptable evidence.* Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The kind of evidence which reasonably prudent persons rely on may be accepted even if it would be inadmissible in a jury trial. The administrative law judge shall give effect to the rules of privilege recognized by law. Objections to evidence may be made and shall be noted in the record. When a hearing shall be expedited and the interests of the parties shall not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form.

41.120(3) *Documentary evidence.* Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original, if available. Any party has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

41.120(4) *Additional disclosure of information requirement.* At least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. An administrative law judge may bar any party that fails to comply with these requirements from introducing the relevant evaluation or recommendations at the hearing without the consent of the other party.

41.120(5) *Independent educational evaluation.* If deemed necessary, the administrative law judge may order an independent educational evaluation, which shall be provided at no cost to the parent and which meets criteria prescribed by the department.

41.120(6) *Opportunity to contest.* The administrative law judge may take official notice of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the administrative law judge. Parties shall be notified at the earliest practicable time, either before or during the hearing or by reference in preliminary reports, and shall be afforded an opportunity to contest such facts before the decision is announced unless the administrative law judge determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

41.120(7) *Administrative law judge may evaluate evidence.* The administrative law judge's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

41.120(8) *Decision.* A decision shall be made upon consideration of the whole record or such portions that are supported by and in accord with reliable, probative and substantial evidence.

281—41.121(17A,256B) Communications.

41.121(1) *Restrictions on communications—administrative law judge.* The administrative law judge shall not communicate directly or indirectly in connection with any issue of fact or law in that contested case with any person or party except upon notice and opportunity for all parties to participate.

41.121(2) *Restrictions on communications—parties.* Parties or their representatives shall not communicate directly or indirectly in connection with any issue of fact or law with the administrative law judge except upon notice and opportunity for all parties to participate as are provided for by administrative rules. The recipient of any prohibited communication shall submit the communication, if written, or a summary of the communication, if oral, for inclusion in the record of the proceeding.

41.121(3) *Sanctions.* Any or all of the following sanctions may be imposed upon a party who violates the rules regarding ex parte communications: censure, suspension or revocation of the privilege to practice before the department, or the rendering of a decision against a party who violates the rules.

281—41.122(17A,256B) Record.

41.122(1) *Open hearing.* Parents involved in hearings shall be given the right to open the hearing to the public. The hearing shall be recorded by mechanized means or by certified court reporters. Any party to a hearing or an appeal has the right to obtain a written or, at the option of the parents, electronic, verbatim record of the hearing and obtain written or, at the option of the parents, electronic findings of fact and decisions. The record of the hearing and the findings of fact and decisions described in this rule must be provided at no cost to parents.

41.122(2) *Transcripts.* All recording or notes by certified court reporters of oral proceedings or the transcripts thereof shall be maintained and preserved by the department for at least five years from the date of decision.

41.122(3) *Hearing record.* The record of a hearing shall be maintained and preserved by the department for at least five years from the date of the decision. The record under this division shall include:

a. All pleadings, motions and intermediate rulings.

b. All evidence received or considered and all other submissions.

c. A statement of matters officially noted.

d. All questions and offers of proof, objections and rulings thereof.

e. All proposed findings and exceptions.

f. Any decision, opinion or report by the administrative law judge presented at the hearing.

281—41.123(17A,256B) Decision and review.

41.123(1) *Decision.* The administrative law judge, after due consideration of the record and the arguments presented, shall make a decision on the appeal.

41.123(2) *Basis of decision.* The decision shall be based on the laws of the United States and the state of Iowa and the rules and policies of the department and shall be in the best interest of the education of the individual.

41.123(3) *Time of decision.* The administrative law judge's decision shall be reached and mailed to the parties within 45 calendar days after the department receives the original request for a hearing, unless a continuance has been granted by the administrative law judge for a good cause.

41.123(4) *Impartial decision maker.* No individual who participates in the making of any decision shall have advocated in connection with the hearing, the specific controversy underlying the case or other pending factually related matters. Nor shall any individual who participates in the making of any proposed decision be subject to the authority, direction or discretion of any person who has advocated in connection with the hearing, the specific controversy underlying the hearing or a pending related matter involving the same parties.

281—41.124(17A,256B) Finality of decision.

41.124(1) *Decision final.* The decision of the administrative law judge is final. The date of postmark of the decision is the date used to compute time for purposes of appeal.

41.124(2) *Civil action.* Any party who is aggrieved by the findings and decision can bring civil action. A party initiating civil action in federal court shall provide an informational copy of the petition or complaint to the department within 14 days of filing the action. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

41.124(3) *Department dissemination.* The department, after deleting any personally identifiable information, shall transmit those findings and decisions to the state advisory panel and shall make those findings and decisions available to the public.

281—41.125(17A,256B) Individual's status during proceedings. Except as provided in subrule 41.73(2), during the pendency of any administrative or judicial proceeding regarding a hearing, unless the agency and the parents of the individual agree otherwise, the individual involved in the hearing must remain in the current educational placement. If the hearing involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings. If the decision of an administrative law judge in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the state or local agency and the parents. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with individuals who are endangering themselves or others.

281—41.126 and **41.127** Reserved.